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IN THE SUPREME COURT OF THE STATE OF NEVADA

HON. KENNY C. GUINN, GOVERNOR OF THE)
STATE OF NEVADA,)

Petitioner,)

vs.)

THE LEGISLATURE OF THE STATE OF NEVADA;)
HON. LORRAINE T. HUNT, PRESIDENT OF THE)
SENATE; HON. RICHARD D. PERKINS, SPEAKER)
OF THE ASSEMBLY; SENATOR MARK E. AMODEI;)
SENATOR TERRY CARE; SENATOR MAGGIE)
CARLTON; SENATOR BARBARA CEGAVSKE;)
SENATOR BOB COFFIN; SENATOR WARREN B.)
HARDY; SENATOR BERNICE MATHEWS;)
SENATOR MIKE MCGINNESS; SENATOR JOSEPH)
M. NEAL, JR.; SENATOR DENNIS NOLAN;)
SENATOR ANN O'CONNELL; SENATOR WILLIAM)
J. RAGGIO; SENATOR RAYMOND D. RAWSON;)
SENATOR DEAN A. RHOADS; SENATOR MICHAEL)
SCHNEIDER; SENATOR RAYMOND C. SHAFFER;)
SENATOR SANDRA TIFFANY; SENATOR DINA)
TITUS; SENATOR RANDOLPH TOWNSEND;)
SENATOR MAURICE WASHINGTON; SENATOR)
VALERIE WIENER; ASSEMBLYMAN BERNIE)
ANDERSON; ASSEMBLYMAN WALTER ANDONOV;)
ASSEMBLYWOMAN SHARRON E. ANGLE;)
ASSEMBLYMAN MORSE ARBERRY, JR.;)
ASSEMBLYMAN KELVIN D. ATKINSON;)
ASSEMBLYMAN BOB BEERS; ASSEMBLYMAN)
DAVID BROWN; ASSEMBLYWOMAN BARBARA)
E. BUCKLEY; ASSEMBLYMAN JOHN C.)
CARPENTER; ASSEMBLYWOMAN VONNE S.)
CHOWNING; ASSEMBLYMAN CHAD)
CHRISTENSEN; ASSEMBLYMAN JERRY D.)
CLABORN; ASSEMBLYMAN TOM COLLINS;)
ASSEMBLYMAN MARCUS CONKLIN;)
ASSEMBLYMAN JASON GEDDES;)
ASSEMBLYWOMAN DAWN GIBBONS;)
ASSEMBLYWOMAN CHRIS GIUNCHIGLIANI;)
ASSEMBLYMAN PETE GOICOECHEA;)
ASSEMBLYMAN DAVID GOLDWATER;)
ASSEMBLYMAN TOM GRADY; ASSEMBLYMAN)
JOSH GRIFFIN; ASSEMBLYMAN DON GUSTAVSON;)
ASSEMBLYMAN JOE HARDY; ASSEMBLYMAN)
LYNN C. HETTRICK; ASSEMBLYMAN WILLIAM C.)
HORNE; ASSEMBLYMAN RON KNECHT;)
ASSEMBLYWOMAN ELLEN M. KOIVISTO;)
ASSEMBLYWOMAN SHEILA LESLIE;)
ASSEMBLYMAN R. GARN MABEY, JR.;)
ASSEMBLYMAN MARK A. MANENDO;)
ASSEMBLYMAN JOHN A. MARVEL;)
ASSEMBLYWOMAN KATHY McCLAIN;)

Case No. _____

1 ASSEMBLYMAN BOB McCLEARY;)
2 ASSEMBLYMAN HARRY MORTENSON;)
3 ASSEMBLYMAN JOHN OCEGUERA;)
4 ASSEMBLYWOMAN GENIE OHRENSCHALL;)
5 ASSEMBLYMAN DAVID R. PARKS;)
6 ASSEMBLYWOMAN PEGGY PIERCE;)
7 ASSEMBLYMAN ROD SHERER;)
8 ASSEMBLYWOMAN VALERIE WEBER;)
9 ASSEMBLYMAN WENDELL P. WILLIAMS,)
10 Respondents.)

11
12 **PETITION FOR WRIT OF MANDAMUS**
13

14 COMES NOW the Honorable Kenny C. Guinn, Governor of the State of Nevada, by and
15 through his counsel, Nevada Attorney General Brian Sandoval, and respectfully petitions the Supreme
16 Court of the State of Nevada for the issuance of a Writ of Mandamus under the Seal of the Court to
17 Respondents, the Legislature of the State of Nevada, et al., directing said Respondents to fulfill their
18 constitutional obligations in compliance with the provisions of the Nevada Constitution under Article
19 11, § 6 and Article 9, § 2, and directing such other and further relief as this Court determines is proper.

20 This Petition is brought on the following grounds:

21 1. The Nevada Supreme Court has original jurisdiction to issue writs of mandamus. Nev. Const.,
22 art. 6, § 4. NRS 34.150 *et seq.*

23 2. The supreme executive power of the State is vested in the Governor of the State of Nevada.
24 Nev. Const., art. 5, § 1. The Governor shall see that the laws are faithfully executed. Nev. Const., art.
25 5, § 7.

26 3. The Nevada Legislature and its members are constitutionally mandated to provide for the
27 support and maintenance of common schools by direct legislative appropriation from the general fund.
28 Nev. Const., art. 11, § 6.

4. Approval of no less than two-thirds of the members elected in each house is required to pass
any bill which creates, generates, or increases any public revenue in any form, including taxes, fees,
assessments and rates. Nev. Const., art. 4, § 18.

1 5. The Nevada Legislature and its members are also constitutionally mandated to approve a
2 balanced budget by providing an annual tax to defray the estimated expenses of the State for each fiscal
3 year. Nev. Const., art. 9, § 2.

4 6. In Nevada, the fiscal year commences on the first day of July of each year. Nev. Const., art.
5 9, §1.

6 7. The State of Nevada's system of financial administration operates on biennial budgets which
7 are submitted to the Legislature prior to the commencement of each regular session of the Nevada
8 Legislature. Nev. Const., art. 4, § 2 and art. 9, §1.

9 8. During the 120-day 72nd Session of the Legislature, the 10-day 19th Special Session of the
10 Legislature, and the continuing 20th Special Session of the Legislature, the Legislature has violated the
11 Nevada Constitution by failing to provide for the support and maintenance of the common schools, by
12 failing to approve a balanced budget, and by not providing an adequate tax plan to defray the estimated
13 expenses for fiscal years July 1, 2003 – June 30, 2004 (FY04) and July 1, 2004 – June 30, 2005 (FY05).

14 9. The State of Nevada's Kindergarten through 12th Grade (K-12) educational system will be
15 harmed as a result of the Legislature's failure to comply with its Constitutional mandates.

16 10. A Writ of Mandamus is proper to compel the performance of the Legislature to comply with
17 the provisions of the Nevada Constitution.

18 11. The circumstances in this matter reveal urgency and strong necessity to act, and there is no
19 plain, speedy, or adequate remedy at law to compel the Legislature to perform its constitutional duty.

20 12. The Petitioner's request for a Writ of Mandamus is necessary in order to compel the
21 Legislature to comply with the Nevada Constitution and the dictates of its office and to prevent further
22 harm and injury to the State of Nevada.

23 13. This Petition is made and based upon the Affidavits and Exhibits appended hereto, and the
24 Memorandum of Points and Authorities filed herewith.

25 WHEREFORE, Petitioner respectfully petitions this Court to issue a Writ of Mandamus
26 whereby the Court:

1. Finds the Nevada Legislature and its members in violation of Article 11, § 6 and Article 9, § 2 of the Nevada Constitution by their failure to fund K-12 education and to approve a balanced budget for FY04 and FY05;

2. Directs the Legislature and its members to act by a time certain to comply with Article 11, § 6 of the Constitution of the State of Nevada by authorizing and appropriating an amount sufficient for the support and maintenance of the common schools by direct legislative appropriation from the general fund;

3. Directs the Legislature and its members to act by a time certain to comply with Article 9, § 2 of the Constitution of the State of Nevada by providing by law for an annual tax sufficient to defray the estimated expenses of the state for the fiscal years commencing July 1, 2003 (FY04), and July 1, 2004 (FY05);

4. Permits the Petitioner leave to amend this Petition for Writ of Mandamus to seek additional remedies in the event the Legislature fails to act as required by this Court; and

5. Directs such other and further relief as this Court determines is proper.

Dated this day of , 2003.

BRIAN SANDOVAL
Nevada Attorney General
JEFF PARKER
Solicitor General

Office of the Attorney General
100 No. Carson Street
Carson City, Nevada 89701
Telephone (775) 684-1100
Fax (775) 684-1108

Attorney for Petitioner
Kenny C. Guinn, Governor of the State of Nevada

**MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS**

The Governor of the State of Nevada hereby petitions this Court for a Writ of Mandamus compelling execution of the mandatory, non-discretionary provisions of Article 11, § 6 and Article 9, § 2 of the Nevada Constitution by Respondents, the Legislature of the State of Nevada and its members, in their official capacities.

I. STATEMENT OF FACTS

On June 2, 2003, the last day of the 72nd Regular Session of the Nevada Legislature, the State Senate introduced Senate Bill (SB) 509 to provide revenue to support the balancing of the state budget, including the authorization and appropriation of the Distributive School Account to provide funding for the operation of Nevada's K-12 educational system for the 2003-2005 biennium. SB 509 (2003). SB 509 was passed out of the Senate Committee on Finance, but was not voted upon by the body of the Senate and as a result SB 509 failed during the 72nd Regular Session of the Nevada Legislature.

Again, on June 6, 2003, during the 19th Special Session of the Nevada Legislature, the State Senate introduced SB 2 to authorize and appropriate the Distributive School Account (DSA) in the state general fund for the 2003-2005 biennium. That same day, the State Senate passed SB 2 (20 in favor and 1 excused) and transmitted it to the State Assembly's Select Committee on State Revenue and Education Funding (Assembly Committee). On June 7, 2003, in the Assembly Committee, a motion was made to pass SB 2; however, that motion failed. As a result, SB 2 failed to pass during the 19th Special Session of the Nevada Legislature.

On June 25, 2003, the first day of the 20th Special Session, the State Senate once again introduced DSA legislation as SB 5 to authorize and appropriate monies to fund Nevada's K-12 educational system for the 2003-2005 biennium. This legislative measure was immediately passed by the State Senate's unanimous vote in favor of the bill. SB 5 was then transmitted to the Assembly for its consideration and approval. To date, the State Assembly has not acted upon this legislation.

Moreover, on June 25, 2003, the State Senate also approved and passed SB 6, a tax measure that provides a balanced budget for the financial administration of the State of Nevada, including the revenue necessary for the Distributive School Account funding of K-12 education over the next biennium. Upon passage of SB 6 by the State Senate (15 in favor, 5 against and 1 abstention), SB 6 was

1 transmitted to the State Assembly.

2 In considering SB 6, the State Assembly has proposed two amendments to this legislation
3 (Amendment Nos. 3 and 4). In part, these amendments incorporate the DSA appropriation and
4 authorization into SB 6 and also provide for a tax structure that will result in a balanced budget for
5 FY04 and FY05. However, even with the proposed amendments, the State Assembly has failed on two
6 occasions to pass SB 6 by a two-thirds majority which requires at least 28 votes in the Assembly. The
7 State Assembly votes on SB 6 were both 27 to 15, missing the constitutionally mandated two-thirds
8 majority by a single vote.

9 Despite the 120 days of the 72nd Regular Session of the Nevada Legislature, the 10 days of the
10 19th Special Session and the ongoing 20th Special Session, the Legislature has failed to comply with the
11 mandatory, non-discretionary provisions of the Nevada Constitution requiring it to fund education and
12 balance the budget.

13 Although today, July 1, 2003, marks the beginning of the new biennium and new fiscal year, the
14 Nevada Legislature has failed to fund K-12 education and provide for a balanced budget, thus, violating
15 the Nevada Constitution. As a result, the Nevada Legislature and its members have violated and
16 continue to violate the Nevada Constitution, which they have taken a sworn oath to uphold. Nev.
17 Const., art. 15, § 2.

18 To date, the Legislature has appropriated and authorized general fund expenditures in the
19 amount of \$3,264,269,361 for FY04 and FY05. The Distributive School Account, which funds K-12
20 education, has not been appropriated or authorized by the Legislature. The amount of general fund
21 dollars necessary to fund the Distributive School Account for FY 04 and FY05 is \$1,643,253,297, based
22 on SB 2 of the 19th Special Session. *See*, Affidavit of John P. Comeaux, Director of the Nevada
23 Department of Administration.

24 The total general fund dollars necessary to support the State of Nevada budget for FY04 and
25 FY05, including the Distributive School Account, is \$4,907,522,658. Additionally, the estimated cost
26 of the 2005 legislative session is \$13,000,000, and the minimum ending fund balance of five percent of
27 the total appropriation will require an additional \$37,000,000, for a total general fund obligation of
28 \$4,957,522,658. The estimated fiscal resources for FY04 and FY05 are \$4,087,611,943. Therefore, the

1 amount of the unfunded balance for FY04 and FY05 is \$869,910,715. *See*, Affidavit of John P.
2 Comeaux, Director of the Nevada Department of Administration.

3 Unless the Legislature approves the Distributive School Account there will be no general fund
4 monies available for K-12 education in Nevada for FY 04 and 05. *See*, Affidavit of John P. Comeaux,
5 Director of Department of Administration.

6 II. ARGUMENT

7 A. A Writ of Mandamus Should Issue to Compel the Legislature to Comply with its 8 Duties as Required by the Nevada Constitution.

9 1. The Nevada Supreme Court has Original Jurisdiction to Issue a Writ of Mandamus.

10 This Court has original jurisdiction to issue writs of mandamus under Article 6, Section 4 of the
11 Nevada Constitution. *Employers Ins. Co. of Nevada v. State Bd. of Examiners*, 117 Nev. Ad. Op. No.
12 24, 21 P.3d 628, 630 (2001). The Court is also statutorily empowered to issue writs. *See*, NRS Chapter
13 34.160 *et seq.*

14 2. A Writ of Mandamus is Available.

15 A writ of mandamus is available to compel the performance of an act which the law requires as
16 a duty resulting from an office, trust or station. *Young v. Board of County Commissioners*, 91 Nev. 52,
17 56 (1975); *Building and Construction Trades Council v. State ex .rel. Public Works Board*, 108 Nev.
18 650, 609 (1992); *Brewery Arts Center v. State Board of Examiners*, 108 Nev. 1050, 1054 (1992); NRS
19 34.160. A writ shall be issued in all cases where there is no plain, speedy and adequate remedy in the
20 ordinary course of law. NRS 34.170. Even though, as a general rule, extraordinary writs are not
21 appropriate in the face of effective alternative remedies, it is settled law that this Court may grant such
22 relief where the circumstances reveal urgency and strong necessity. *See, Jeep Corp. v. Second Judicial*
23 *District Court*, 98 Nev. 440, 443, 652 P.2d 1183 (1982). Additionally, in the discretion of the court, the
24 writ of mandamus may be returnable and a hearing may be held. NRS 34.180.

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1 3. The Nevada Legislature and its Members have a Constitutional Duty to Act.

2 The Nevada Constitution, Article 11, Section 6, provides:

3 In addition to other means provided for the support and maintenance
4 of said university and common schools, the legislature shall provide for
5 their support and maintenance by direct legislative appropriation from
6 the general fund, upon the presentation of budgets in the manner required
 by law.

7 Additionally, the Nevada Constitution, Article 9, Section 2, Subsection 1, provides:

8 The legislature shall provide by law for a tax sufficient to defray the
9 estimated expenses of the state for each fiscal year; and whenever the
10 expenses of any year exceed the income, the legislature shall provide
11 for levying a tax sufficient, with other sources of income, to pay the
 deficiency, as well as the estimated expenses of such ensuing year or
 two years.

12 Moreover, the Nevada Constitution, Article 4, Section 19, provides: “[n]o money shall be drawn
13 from the treasury but in consequence of appropriations made by law.”

14 The “shall” in each of these constitutional provisions is mandatory, not discretionary. It is a
15 basic rule of statutory construction that the term “shall” is presumptively mandatory. *Nevada Comm’n*
16 *on Ethics v. JMA/Lucchesi*, 110 Nev. 1, 9-10, 866 P.2d 297 (1994).

17 The Nevada Supreme Court has specifically recognized the mandatory application of the Nevada
18 Constitution to the Legislature. “Save that the legislature *must obey* the direct commands of the
19 constitution, and submit to its express or necessarily implied prohibitions, it has unlimited law-making
20 power...” (emphasis added) *Dunker v. Chedic*, 4 Nev. 380, 382 (1868). In *State of Nevada ex*
21 *rel. Chase v. Rogers*, 10 Nev. 250, 255 - 256, (1875) this Court said:

22 If one or more of the positive provisions of the Constitution may be
23 disregarded as being directory, why not all? And if all, it certainly requires
24 no argument to show what the result would be. *The Constitution, which is*
25 *the paramount law, would soon be looked upon and treated by the*
26 *legislature as devoid of all moral obligations; without any binding force*
27 *or effect; a mere “rope of sand,” to be held together or pulled to pieces at*
28 *its will and pleasure.* We think the provisions under consideration must
 be treated as mandatory, and agree with Judge Cooley that “there are few
 evils which can be inflicted by a strict adherence to the law so great as that
 which is done by the habitual disregard, by any department of the
 government, of a plain requirement of that instrument from which it
 derives its authority, and which ought, therefore, to be scrupulously
 observed and obeyed.” (emphasis added).

1 Similarly, in this instance, this Court must demand strict adherence to the mandates of the
2 Nevada Constitution. Any other result will render the Nevada Constitution meaningless and unwind the
3 thread that holds the fabric of our system of government in place. “[I]t is but fair to presume that the
4 people in their constitution have expressed themselves in careful and measured terms, corresponding
5 with the immense importance of the powers delegated, and with a view to leave as little as possible to
6 implication.” Id. at 254; citing Cooley’s Const. Limitations, p. 78.

7 4. Mandamus Should Issue.

8 The issues presented in this Petition to the Court are unique and unprecedented in the history of
9 the State of Nevada. Although some state courts are reluctant to interfere with the legislative process,
10 they have not failed to act in this vital area when such action is justified and where a legislative body
11 has failed to meet its constitutional obligations. For example, the Washington Supreme Court has
12 found that constitutional provisions imposing an affirmative duty upon the legislature are judicially
13 enforceable in protecting individual rights, such as educational rights. *Seattle Sch. Dist. No. 1 v. State*,
14 90 Wash. 2d 476, 585 P.2d 71, 86-87 (Wash. 1978).

15 As Article 11, § 6 of the Nevada Constitution requires the Legislature to fund education, Article
16 9, Section 1 of the Washington Constitution provides, “It is the paramount duty of the state to make
17 ample provision for the education of all children residing within its borders...” In requiring the
18 legislature to enact adequate funding to support education, the Washington Supreme Court said, “The
19 power of the judiciary to enforce rights recognized by the constitution, even in the absence of
20 implementing legislation, is clear. (Citations omitted). Just as the legislature cannot abridge
21 constitutional rights by its enactments, it cannot curtail mandatory provisions by its silence. The judicial
22 obligation to protect constitutionally declared fundamental rights of individuals is as old as the United
23 States.” Ibid, citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163, 2 L.Ed. 60, 69, (1803).

24 While the Nevada Legislature may have had the discretion to decide how to fund education and
25 balance the budget had they acted in accordance with the Nevada Constitution, by failing to act during
26 the regular session, the first special session, or the second special session to resolve these issues, it has
27 violated the Nevada Constitution and it is appropriate and necessary for this Court to now direct it to
28 act.

The Legislature's failure to adhere to its constitutional duties imperils the State's educational system, places the state on the brink of a fiscal crisis and renders the relevant provisions of the Nevada Constitution meaningless.

III. RELIEF SOUGHT

Because the Legislature has failed in its duties required by the Nevada Constitution to fund education in compliance with Article 11, § 6 and balance the budget as required by Article 9, § 2, this Court should immediately:

1. Find the Nevada Legislature and its members in violation of Article 11, §6 and Article 9, § 2 of the Nevada Constitution by their failure to fund K-12 education and to approve a balanced budget for FY04 and FY05;

2. Direct the Legislature and its members to act by a time certain to comply with Article 11, § 6 of the Constitution of the State of Nevada by authorizing and appropriating an amount sufficient for the support and maintenance of the common schools by direct legislative appropriation from the general fund;

3. Direct the Legislature and its members to act by a time certain to comply with Article 9, § 2 of the Constitution of the State of Nevada by providing by law for an annual tax sufficient to defray the estimated expenses of the state for the fiscal years commencing July 1, 2003 (FY04), and July 1, 2004 (FY05);

4. Permit the Petitioner leave to amend this Petition for Writ of Mandamus to seek additional remedies in the event the Legislature fails to act as required by this Court; and

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VERIFICATION OF BRIAN SANDOVAL

STATE OF NEVADA)
 :SS.
CARSON CITY)

BRIAN SANDOVAL, being first duly sworn, deposes and says:

1. That your affiant is the duly-elected Attorney General of the State of Nevada, and represents Petitioner in the above-entitled Petition for Writ of Mandamus, and is familiar with the facts and circumstances set forth therein and knows the contents thereof to be true, except for those matters stated upon information and belief, and as to those matters, he believes them to be true.

2. That affiant makes this verification pursuant to NRS 15.010, NRS 34.040, NRS 34.170 and NRS 34.330, rather than Petitioner, because the facts relevant to this Petition are within my knowledge as attorney for Petitioner, and on the public records of the Legislature of the State of Nevada.

3. True and correct copies of materials that may be essential and/or helpful to an understanding of the matters set forth in the Petition are contained in the Affidavits and Exhibits attached to this Petition.

FURTHER AFFIANT SAYETH NAUGHT.

DATED this _____ day of 2003.

BRIAN SANDOVAL

SIGNED and SWORN to before me
This _____ day of _____, 2003
By BRIAN SANDOVAL.

Notary Public